

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HUMAN RIGHTS

State of Minnesota, by
Kathryn R. Roberts, Acting Commissioner,
Department of Human Rights,

Complainant,

FINDINGS OF FACT,
CONCLUSIONS AND

ORDER
VS.

Independent School District No. 695,

Respondent.

The above-entitled matter came on for hearing before Jon L. Lunde, Administrative Law Judge, commencing at 9:00 a.m. on October 23, 1984 at the Iron Range Research Center in Chisholm, Minnesota, pursuant to a Complaint and Notice and Order for Hearing dated July 20, 1984. The hearing continued through October 24, 1984 at the same location.

Deborah J. Kohler and Helen G. Rubenstein, Special Assistant Attorneys General, 1100 Bremer Tower, 7th Place and Minnesota Street, St. Paul, Minnesota 55101, appeared on behalf of the Complainant. John D. Kelly, of Hanft, Fride, O'Brien & Harries, P.A., Attorneys at Law, 1200 Alworth Building, Duluth, Minnesota 55802, appeared on behalf of the Respondent. The record closed on February 12, 1985, when the last authorized argument was filed.

NOTICE

Pursuant to Minn. Stat. sec. 363.071, subd. 2, this Order is the final decision in this case and under Minn. Stat. sec. 363.072, the Commissioner of the Department of Human Rights or any other person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. 14.63 through 14.69.

STATEMENT OF ISSUES

The issues in this case are as follows:

1. Whether the Charging Party was sexually harassed by a fellow employee.
2. Whether the Charging Party was discriminated against on the basis of a disability by a fellow employee.

3. Whether the Respondent knew or should have known of the sexual harassment and disability discrimination, if any, that occurred.

4. Whether the Respondent took timely and appropriate action to stop the sexual harassment and disability discrimination, if any, that occurred.

5. Whether the Charging Party is entitled to any relief from the Respondent as a result of the sexual harassment and disability discrimination, if any, that occurred.

Based upon all the files, records and proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Charging Party, Mary Silvestri, is a life-long resident of Chisholm, Minnesota. Since 1971, she has been employed by the Respondent as an elementary school teacher. During the first four years of her employment she worked as a special education teacher in the Title I program. Thereafter, she taught fourth grade. She was last paid a monthly salary of \$2,066.

2. Silvestri has a 75% disability of her left hand and forearm resulting from a dog bite she sustained in 1977. The bite required treatment to prevent rabies and several operations. Due to nerve damage and impaired circulation resulting from the bite, she is frequently required to wear a brace on her forearm, and she must take precautions to avoid any reinjury.

3. Richard Stocco is also employed by the Respondent as a fourth grade teacher. He has been employed in that capacity as long as Silvestri has.

4. Before the 1980-81 school year began, Silvestri and Stocco taught at the elementary school in Chisholm. In most years, their classrooms were located in different wings of the building and they had little direct contact with one another and no personal or professional disputes.

5. Commencing with the 1980-81 school year, all fourth grade classes (4) were transferred from the elementary school to the third floor of the junior high school. Fifth grade classes (4) and a library were also located on the third floor after that time. During school hours, 200 students and 9 teachers would normally be present on the third floor.

6. From the beginning of the 1980-81 school year, through the end of the 1982-83 school year, Stocco's assigned classroom was located at the top of the

steps near the girls lavatory. Silvestri's assigned classroom was next to Stocco's. A common 'storeroom', approximately 25 feet long and 12 feet wide, separated their classrooms. The storeroom was accessible from each room, and the classrooms were accessible to one another by way of the storeroom. Silvestri and Stocco used this storeroom as a lounge area where they could drink coffee. The storeroom was also used to store teaching materials, such as films, and, a piano.

7. Silvestri's classroom was also accessible from the hallway and from a "library storeroom". One could go from the library, to the library storeroom and then to Silvestri's classroom.

8. After their transfer to the junior high school, Silvestri and Stocco had personal and business contacts in addition to their direct contacts at school. Silvestri and her husband, Robert, hired Stocco to work on their house in 1980 and again in late 1982, and the Silvestris played cards with Stocco and his wife on several occasions.

9. Initially, Silvestri and Stocco got along well together. Late in 1980 they jointly grieved a reprimand from the junior high school principal, John Antognozzi, and got Silvestri's brother, Terry Aronson, a lawyer, to represent them. Antognozzi had reprimanded them when a fire inspector discovered that someone had been smoking in the storeroom.

10. As the 1980-81 school year progressed, however, the working relationship between Stocco and Silvestri deteriorated. Stocco began asking Silvestri about her sex life and mentioned sexual matters, such as his concerns of impotence. He would occasionally "nudge" her then excuse himself, and several times he said in front of her class: "You know what I'd like to go to you." Silvestri told Stocco that his comments made her uncomfortable and she asked him to stop, but he did not do so. Silvestri was also dissatisfied with Stocco's attitude toward school, particularly his unhappiness with the fourth grades' transfer to the junior high school.

11. In the spring of 1981, Silvestri mentioned some of her complaints about Stocco to Herbert Sellars. At that time, Sellars was a counselor at the junior high school. She told Sellars that Stocco had a bad attitude, that he was moody, and that he had made harassing comments to her regarding their use of the storeroom and other things. Silvestri did not tell Sellars what Stocco's specific remarks were. She was concerned about the effect disclosure of those comments would have on her daughter, who was a pupil in Stocco's class that year. At the time of her conversation with Sellars, Silvestri expressed a desire to be transferred. Sellars suggested that Stocco had a lot of problems, and that Silvestri should try to work with him and to improve her own attitude.

12. After her conversation with Sellars in 1981, Silvestri made no further complaints to school officials about harassment by Stocco until the spring of 1983. However, prior to January of 1983, Silvestri had complained to Sellars

about Stocco's use of films that were sent to her, and problems they had over the use of the storeroom. At the time of these complaints, Sellars was the elementary school principal. He became the elementary school principal at the commencement of the 1981-82 school year. As the elementary school principal, Sellars had immediate supervisory authority over elementary school teachers, including those whose classrooms were located in the junior high school, where John Antognozzi was the principal.

13. After classes one day early in January, 1983, about 3:00 p.m., Stocco asked Silvestri to come into the storeroom. When she went in, he closed the door, unzipped his pants, and exposed his penis. Then he grabbed her, twisted her disabled arm and forced her mouth to his penis. She momentarily got away,

slapped him and told him he was sick. He pushed her to a wall, grabbed her disabled arm again and twisted it, warning that if she wanted an arm she would not scream. While restraining her, he ejaculated on her. After that he said: "You certainly are a fighter"; "I wanted to try this"; and "You really don't like this do you". Initially, Stocco seemed remorseful. However, when Silvestri said she was reporting him, he threatened to injure her arm, to give her daughter an experience she would never forget, and to make her look bad.

14. Silvestri did not report this incident to anyone. She was confused, worried about Stocco's threats, and concerned about her husband's health -- he suffers from lupus erythematosus and must avoid emotional stress.

15. Later in January, Stocco brought his class to Silvestri's so they could jointly watch a film. After the film began, Stocco sat by Silvestri. Then, during the film, he grabbed her hand and put it on his penis, which was exposed. Silvestri left the room. Stocco followed her. She intended to report him at that time, but he warned her not to and told her to remember her daughter. Silvestri made no report. Instead she went to the teachers lounge.

16. Still later in January, after classes, when Silvestri was writing on the blackboard in her room, near the door to the library storeroom, Stocco came through that door. He grabbed her and pulled her into the library storeroom. While twisting her arm he put his finger in her vagina and he ejaculated on the skin of her back. After he finished, Stocco again threatened Silvestri's daughter and also threatened her husband. Silvestri, still confused and afraid, made no immediate report of this incident to school administrators. -However, one night in January, Silvestri spoke to Judith Sellman, a school board member, about Stocco. The conversation occurred when Sellman, a close friend of Silvestris, visited Silvestri at her home. At that time, Silvestri explained that Stocco had begun bothering her in 1981 and that she had spoken to Sellars at that time. She also told Sellman that she was still being harassed by Stocco. Silvestri did not describe the nature of Stocco's acts in specific terms. Since Silvestri told Sellman that she planned to report Stocco to school administrators, Sellman assumed that they would handle the matter.

17. Late in January, or early in February, 1983, Stocco molested Silvestri at her home. He came to the Silvestri home that night to complete some carpentry work in their basement. Stocco had been hired to do the work in December, 1982, but it had never been completed. Silvestri did not know Stocco was coming that night, and did not expect that he would ever return to complete the work. During the course of the evening, Stocco asked Robert

Silvestri to drive to Hibbing for some materials. After Robert left, Stocco came upstairs. Silvestri was seated on a couch. Stocco tried to get on top of her, but got up almost immediately because he heard Robert returning.

18. Shortly after the incident in her home, and before Silvestri talked to her husband or school officials, Stocco molested her again. After classes one day, when Silvestri was picking up paper towels near the girls' locker area, Stocco grabbed her and took her into a nearby janitors closet where he forced her into an oral sex act causing him to ejaculate.

19. Within a day, Silvestri reported Stocco's prior behavior to her husband, Robert. He was furious, and although he was a police officer at that time (since June 1983 he has been the Chief of Police), he chose not to take any official action. Instead, the next day he called Stocco out of his classroom. At that time, Robert told Stocco that he knew what Stocco had done to his wife and he warned him to stay away from her.

20. Silvestri's husband was sick in February. He was hospitalized for a short period and stayed home afterwards. Silvestri frequently stayed home with him during that month. Silvestri herself had an ear infection in February which required surgery late that month. That caused her to miss additional work.

21. Early in March, 1983, during classes, Silvestri went into Stocco's room to obtain reading records she needed to prepare report cards. When she approached Stocco's desk she discovered that his penis was exposed to her. She took the reading records and left. Later that month, during classes, Silvestri went into the storeroom separating her classroom from Stocco's to get something. At that time she had a key to the storeroom doors and she used it to lock the door leading to Stocco's room. While in the storeroom, Stocco came in through her classroom and attempted to force her to perform an oral sex act. She refused and he left.

22. After these last two incidents, Silvestri talked to Sellars about Stocco. The conversation occurred in her classroom after school. At that time, Silvestri told Sellars that she was being verbally harassed by Stocco. She also reported that Stocco had tried to touch her or grab her at her home on one occasion and that Stocco had made gestures with his zipper while a film was being shown to their classes. Silvestri did not report that she had been sexually assaulted at school or relay any of the other incidents which had occurred. When asked if Stocco had exposed himself during the film, Silvestri said no. Since Silvestri's husband was a police officer, Sellars asked whether any criminal charges were being considered in connection with the incident at her home. Silvestri said she had no such intention. At the conclusion of their meeting, Sellars told Silvestri to keep a log of her problems with Stocco, and assured her that he would check into her complaints.

23. The next day, Sellars spoke to Stocco about the zipper gesture and the verbal harassment Silvestri had mentioned. Sellars did not discuss the incident at Silvestri's home. He believed that was outside his jurisdiction. Stocco denied making a gesture with his zipper or doing anything else of a sexual nature. Nonetheless, Sellars advised Stocco that the "verbal kinds of things had to stop" and that he did not want any "problems physically". Sellars told Stocco that the kinds of behavior Silvestri mentioned were grounds for dismissal.

24. Except for his discussion with Stocco, Sellars made no inquiries of other teachers regarding the verbal harassment Silvestri mentioned.

25. School personnel noticed a deterioration in the relationship between Stocco and Silvestri during the 1982 - 83 school year. Several teachers noticed that the two were never seen on duty in the halls at the same time or place, and noticed that both appeared displeased when the other's name was

mentioned in conversation. However, apart from these general observations, no one had reported any specific incidents between the two to Sellars or Antognozzi and no prior complaints of verbal or sexual harassment had been made regarding Stocco.

26. Several times in March and April 1981, Silvestri complained to Sellars about the remarks Stocco was making and her inability to get along with him. During these conversations Silvestri suggested that Stocco be transferred to the elementary school. Sellars perception at this time was that Silvestri was becoming more stress laden and was not feeling well about work. Consequently, during one conversation he suggested that she consider counseling.

27. Throughout March and April Stocco was verbally abusive toward Silvestri. He called her 'rabid' and "one arm", repeatedly told her he was going to get her, and frequently just smiled at her. On awards day, May 4, 1983, when most classes were gone from the building, Stocco tried to grab Silvestri when she came out of a stall in the women's bathroom. She broke loose and locked herself in the stall for 20 minutes before she felt that it was safe to leave.

28. On May 12, 1983, Silvestri talked to Antognozzi about Stocco. She told him that she was being verbally harassed by Stocco in connection with her use of the storeroom and films. She did not mention any sexual assaults, and did not give any details of the kinds of comments Stocco was making to her. Antognozzi suggested that she keep a log of Stocco's behavior, and sensing that she was very upset about the situation, he suggested that she call Axonson, her brother, to arrange a meeting with school officials.

29. Antognozzi and Aronson met at the junior high school in the afternoon the next day. About ten minutes after the meeting began, Sellars joined them. Aronson was unaware of the details of Silvestri's complaints about Stocco at that time; all Silvestri had told him was that she had been sexually and physically harassed. Sellars or Antognozzi mentioned the storeroom and zipper incidents", but did not describe them, and no other sexual incidents were discussed at the meeting. Aronson expressed his concern for Silvestri's health and Sellars suggested that she might obtain some counseling. Aronson generally explained his opinion the school was required to investigate Silvestri's complaints and take appropriate action. In that regard, the three men discussed Stocco's transfer to the elementary school and the potential union problems that could create. Sellars also suggested that Silvestri might take some legal action. Toward the end of the meeting, it was agreed that Sellars should talk to Stocco and Silvestri in an attempt to resolve their disputes, and he left the meeting to do so.

30. Sellars met with Silvestri and Stocco later that afternoon. He told them about the meeting with Aronson and Antognozzi and said that he was concerned about them as professionals and concerned about the effect their

continued bickering" might have upon their job performance. Since he viewed their relationship as one involving two professionals who could not get along, he instructed them that the "bickering" was to stop And that they were to have no contacts, except for necessary professional contacts, unless he was present.

31. The meeting did not go well. Silvestri stated that she was unable to work with Stocco, and both Stocco and Silvestri argued back and forth about the other's actions and the need for a transfer. Sellars told them that tranfers were an administrative matter. Shortly after the meeting was concluded, Sellars received reports from both Stocco and Silvestri regarding derogatory remarks the other had made after the meeting.

32. After Aronson's meeting with Sellars and Antognozzi, Aronson gave Silvestri a volume of the Northwestern Reporter, Second Series, which contained the Minnesota Supreme Court's decision in Continental Can Co. v. State, 297 N.W.2d 241 (Minn. 1980). Silvestri deliveried the book to Antognozzi who subsequently read the case. About that time, Antognozzi attempted to verify Silvestri's complaints by speaking Lo two teachers assigned to the third floor. Neither of them was aware of any improper treatment of Silvestri by Stocco.

33. Shortly after the May 13th meeting, Sellars spoke to Silvestri about room assignments for the 1983 - 84 school year. He told her that she was to take Stocco's room, that Jerry Jordan would be taking her room and that Stocco was being moved down the hall. Sellars believed that this would reduce the contacts between Sellars and Stocco, thereby reducing the friction between them, and eliminate the arguments they had with the storeroom. He told her at that time that Stocco was not being transferred.

34. After the meeting of May 13, 1984, Aronson advised Silvestri to reduce her complaints about Stocco to writing, and to be very specific. On May 31, 1983, near the end of the school year, Silvestri delivered a letter to Antognozzi which stated as follows:

Please take notice that I am hereby requesting that you take some remedial action regarding the harassment of me by Richard Stocco. As my employer you have a responsibility legally to attempt to curtail his actions. I am putting you on notice that, despite your verbal admonition May 13, Mr. Stocco continues to harass me verbally, physically, and sexually. I do not want to use the legal system but I will if you refuse to help.

I am specifically requesting that Mr. Stocco be moved to the Vaughan Steffensrud School [the elementary school]. I believe such a move will satisfactorily, at least temporarily, alleviate the current harassment. I do not wish to be moved to the Vaughan because I find it physically very difficult to work with young children with my 75% disability of my left hand and arm.

Please respond by the beginning of the next school year. I feel my mental well-being and personal safety depends on you.

35. After receiving Silvestri's letter of May 31, neither Antognozzi nor Sellars asked her any questions about the verbal, physical and sexual harassment she alleged or the concerns she expressed for her physical safety

and mental well-being. Sellars was surprised by her allegations because he had not received any specific complaints from Silvestri about Stocco after the May 13 meeting.

36. Robert Silvestri also spoke to Sellars and Antognozzi in the spring of 1983. He told Antognozzi that his wife was being verbally harassed at school and that he was hopeful that Stocco would be transferred the next school year. He spoke to Sellars early in June to see if Stocco would be transferred. Sellars told him that he was doing his best to resolve the situation and that a decision on the transfer would be made at the commencement of the next school year.

37. By early June, 1983, Sellman learned about the details of the so-called zipper incident from Silvestri, who told Sellman that Stocco had forcibly placed her hand on his penis during a film. Sellman was also aware of Silvestri's May 31, 1985 letter, but did not know what specific incidents had occurred. In fact, she did not hear any specifics from Silvestri until after Silvestri's discrimination charges were filed.

38. During the summer recess, Sellars and Antognozzi had no other discussions concerning Silvestri's May 31 letter or Stocco's transfer to the elementary school. However, Sellars mentioned the zipper incident to Judith Sellman during the summer recess when she stated that Silvestri should not have to put up with anything sexual on the job. They did not discuss the specifics of that incident or any other specific incidents. Sellars merely mentioned that Stocco had denied Silvestri's allegations.

39. During the summer of 1983, two rumors about Silvestri and Stocco began circulating in Chisholm. One was that an unknown incident of sexual harassment had occurred on the third floor of the junior high school. The other related to an affair between the two. Paul Kruchowski, a school board member, raised these rumors at a board meeting that summer, and inquired whether anything should be done about them. Other board members objected to his questions and no further discussion occurred.

40. Late in August 1983, Silvestri came to school early to prepare her classroom for the upcoming school year. Both Sellars and Antognozzi exchanged greetings with her, but no mention was made of Silvestri's problems with Stocco, her prior letter of May 31, or her request that Stocco be transferred. At that time Silvestri believed that Stocco would be transferred and she was happy about returning to work.

41. Just prior to September 1, 1983, Sellars and Antognozzi discussed Silvestri's May 31st letter with Stocco, who denied everything. Stocco was not warned about such behavior at that time. Sellars simply told him that he wanted everything to work out and for Silvestri and Stocco to get back to doing their jobs.

42. After their conversation with Stocco, Sellars and Antignozzi discussed Silvestri's request to have Stocco transferred. At that time, Sellars decided that a transfer should not take place. He believed that transferring Stocco to teach a lower grade level would be detrimental to the best interests of the pupils and would adversely affect employee morale.

43. Sellars believed that the most logical transfer would be to make Stocco a third grade teacher, and transfer a third grade teacher to the fourth grade. However, he rejected that idea because the third grade teachers were a close-knit group who did a great deal of team teaching. For that reason, and because no first or second grade teachers wanted to exchange duties with Stocco, Sellars decided not to transfer him.

44. On September 1, 1983, Antognozzi and Sellars responded to Silvestri's May 31, 1983 letter. Their response, which was mailed to her at that time, stated in part as follows:

The suggestion of moving Mr. Stocco or you to the Vaughan school at this time is denied in the interest of the total school program and faculty morale.

The written complaint you have made toward Mr. Stocco has been related to him-this was done upon recommendation of the legal staff of the Minnesota Association of Secondary School Principals.

We would recommend a conference with you and a third party of your choosing to be held in the next week. The same suggestion is being made to Mr. Stocco.

If necessary a conference would then be held with all people involved with the hope that this problem can be resolved.

It is also suggested that anything you would consider harrassment [sic] by Mr. Stocco be documented and brought to our attention.

44. Silvestri received the principals' letter prior to the first day of school on September 6, 1983. Although her transfer request had been denied, Silvestri still hoped that she could persuade them to transfer Stocco.

45. September 6, 1983, was a workshop day when teachers got together for preschool meetings. That morning, when Silvestri was at the senior high school for a social gathering, Stocco's wife, who works in the kitchen, asked her who she was going to fantasize about this year. Silvestri was upset about the remark and immediately complained to Sellars about it. He assured her that Mrs. Stocco would not continue making those kinds of statements. That afternoon, the fourth grade teachers were to have a scheduling meeting. Although there were other teachers in the room where the meeting was held, Stocco and Silvestri were the first fourth grade teachers to arrive. After Silvestri sat down, Stocco came and sat beside her. Then, after dropping a pencil, he squeezed her thigh while bending beneath the table to retrieve it. Silvestri immediately left the school. She did not tell Antognozzi or Sellars what Stocco had done.

46. Silvestri did not report to work during the next seven work days.
She
and her husband agreed that she could not return to school at that time.
She
called in her absences on a daily basis and sometimes spoke to Sellars,

reporting to him that she was not able to come to school due to working conditions. Sellars felt that Silvestri was trying to force him to transfer Stocco and that she would not return to school until he did so. He felt that it was a 'push me, pull me kind of thing".

47. On September 15, Silvestri learned that Stocco would not be at school the following day. She telephoned Sellars and told him that she would like to work on the 16th in order to meet her class. Sellars agreed that she could return to work and she did so. Silvestri was happy to be at work that Friday. Everything went so well she decided to return to work the following Monday. On Monday, she felt very agitated knowing that Stocco was present, and during the day, when Silvestri and her class were passing Stocco's room, Stocco made a licking gesture, moving his tongue around his lips. Silvestri decided she could not work at the school anymore, and she has not worked since that day.

48. Silvestri was very unhappy not teaching and with her situation. Before the end of September, she called Michael Novak, a school board member, and talked to him for about an hour about her inability to work. During that conversation, Silvestri told Novak that she was being verbally harassed by Stocco and said that there were incidents where Stocco had grabbed her arm. Most of their conversation regarded harassment, and the fact that Stocco was needling her and would not leave her alone. Silvestri wanted Novak to understand why she was not at work. Novak explained to her that he needed some proof that the harassment she was complaining about had actually occurred.

49. Before his conversation with Silvestri, Novak spoke to Arthur Zahorski, the Superintendent of Schools, about Silvestri's absence from school. Novak insisted, as a board member, that she provide a doctor's excuse for her absences. Zahorski communicated that requirement to Sellars, who called Silvestri late in September to advise her that a doctor's excuse would be required in order for her to remain on sick leave with pay. Subsequently, Silvestri submitted written requests for sick leave pay. All her sick leave requests indicated that her absences from school were due to incidents and conditions at work which caused stress and fear. On September 28, 1983, her requests for sick leave pay were supplemented with a report from Silvestri's doctor. In his letter to Sellars, the doctor indicated that Silvestri was in on-going treatment and counseling for depression secondary to incidents occurring at work over the past year.

50. Late in September, 1983, Robert Silvestri talked with Arthur Zahorski

about his wife's employment. Their conversation occurred at the Kahler Hotel in Hibbing, when they were in attendance at a luncheon. At that time, Silvestri told Zahorski that his wife was having problems with Stocco and that Stocco had grabbed her arm and tried to drag her into a room. Zahorski had previously heard about problems between Silvestri and Stocco. He first heard about the problem in May, when Sellars and Antignozzi discussed room changes that were to be made with him. Zahorski did not inquire into the details of the incident Robert mentioned, but told him that he would check into it when he returned to school. When he returned, he talked to Antignozzi and instructed him to investigate the matter to find out if there was anything going on at school. After that conversation, Antignozzi reported to Zahorski

that he could find no witnesses to the incident Robert mentioned. That fall Zahorski also received reports from Judith Sellman that Silvestri was being verbally, physically and sexually harassed by Stocco and that something should be done. Zahorski told her that it was an administrative matter and that it was being handled.

51. On September 18, 1983, Robert Silvestri spoke to another school board member, Marbello Valentini, regarding his wife's employment. At that time, he told Valentini that his wife was unable to work because Stocco was bothering her at school. On September 20 Valentini went to the Silvestri's home to talk to her. At that time, Silvestri told Valentini that Stocco did not like him; that Stocco had smoked on school premises and that she had to take some of the blame; that Stocco had tried to induce her to go to Antognozzi's office, tear her clothing and claim rape; and that some teachers at school were defiant with the administration. She also mentioned that Stocco was bothering her, but she did not elaborate.

52. The meeting suggested in Sellars and Antognozzi's letter of September 1, 1983, was never held, and Silvestri remained out of school. neither Silvestri nor school officials attempted to schedule it in order to resolve the problem.

53. On October 15, 1983, Silvestri filed a charge of discrimination against the school with the Minnesota Department of Human Rights alleging that she had been subjected to queries about her sex life; physically assaulted on January 19, 1983, when Stocco exposed himself; threatened; subjected to obscene gestures and requests for sexual favors; and forced to lock herself in washroom after being grabbed. Her complaint alleged that she had been unable to work since September 16, 1983, due to fear, and that she believed that she had been discriminated against on the basis of her sex and her disability.

54. After her charge was filed with the Minnesota Department of Human Rights, Silvestri filed a criminal complaint with the St. Louis County Sheriff charging Stocco with the sexual assaults and other actions mentioned herein. An investigation was undertaken and statements were taken from Stocco and other persons with any knowledge of the events charged. Subsequently, when Silvestri learned that she was pregnant, she dropped the charges she had filed against Stocco.

55. When Silvestri's sick leave was exhausted on January 24, 1984, she

requested a leave of absence from her teaching duties until her discrimination

charges against the district were resolved. At that time, her request was granted to June 30, 1984. On June 21, 1984, Silvestri again requested that her leave of absence be extended until such time as her charges were resolved. She received no response to that request.

56. On October 3, 1983, Silvestri began counseling with the Range Mental Health Center Inc. At the time of her referral there, Silvestri had lost 17 pounds since the prior January. She weighed only 85 pounds at that time. She

was experiencing flashbacks of the incidents she experienced with Stocco and would actually become nauseated and vomit when thinking about school. At that

time she was suffering from a chronic panic reaction and was having disturbed sleep and nightmares. Her relationship with her husband was also upset. She had feelings of embarrassment, humiliation and degradation. She was diagnosed as having a post traumatic stress syndrome caused by a psychologically traumatic event outside the realm of normal human experience. Her doctor recommended that Silvestri not return to work so long as Stocco was in the same building.

57. As a direct result of her separation from employment, Silvestri sustained a wage loss and incurred insurance expenses she would not have otherwise had. Her wage loss through February 28, 1985, is approximately \$21,693, being \$2,066 monthly for ten and one-half months. Her out-of-pocket insurance expenses were \$1,874.95.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. That the Administrative Law Judge has subject matter jurisdiction herein and authority to order the relief granted under Minn. Stat. SS 363.071, subds. 1 and 2, and 14.50 (1982).

2. That the Complainant gave proper notice of the hearing in this matter and has fulfilled all relevant substantive and procedural requirements of statute and rule.

3. That the Respondent is an employer as defined in Minn. Stat. sec. 363.01, subd. 15 (1982).

4. That under Minn. Admin. R. 1400.7300, subp. 5 and principals of substantive law, the Complainant has the burden of proof to establish by a preponderance of the evidence that the Charging Party was sexually harassed, and that the Respondent knew or should have known about the harassment but failed to take timely and appropriate action to correct it.

5. That the Complainant established by a preponderance of the evidence that the Charging Party was sexually harassed and subject to unwelcome sexual advances, sexually motivated physical contact and other verbal and physical conduct of sexual nature which created an intimidating, hostile and offensive employment environment for purposes of Minn. Stat. sec. 363.01, subd. 10a (1982).

6. That the Respondent knew or should have known of the existence of the harassment and failed to take timely and appropriate action to stop it for purposes of Minn. Stat. sec. 363.01, subd. 10a(3) (1982).

7. That as a result of the sexual harassment of the Charging Party and the Respondent's failure to take timely and appropriate action to stop it, the Charging Party was constructively discharged from her employment on October 1, 1983.

6. That the Charging Party's constructive discharge from her employment and the wage loss she subsequently incurred was attributable in part to her failure to make full disclosure of the nature and seriousness of the acts of sexual harassment which occurred on the job and for that reason her wage losses and other damages should not be fully compensated.

9. That the Respondent should pay the Charging Party 75% of her lost wages through February 28, 1985, or \$16,269.75, without interest; should pay her out-of-pocket insurance expenses of \$1,874.95; and should reinstate one-half of the sick leave used the Charging Party after October 1, 1983.

10. That the Respondent should pay a civil penalty to the state in the amount of \$2,500 pursuant to Minn. Stat. sec. 363.071, subd. 2 (1983).

11. That the Respondent should pay to the Charging Party the sum of \$2,500 as and for punitive damages pursuant to Minn. Stat. sec. 363.071, subd. 2 (1983 Supp.).

12. That the Charging Party should not recover for the mental anguish and suffering she has experienced and will continue to experience as a result of the sexual assaults which occurred because the Respondent did not and should not have known that they occurred prior to October 1, 1983 due to the Charging Party's failure to report them.

13. That the Charging Party is entitled to reinstatement as an elementary school teacher in a building where Richard Stocco is not also employed before the commencement of the 1985-86 school year.

14. That the Complaint's post-hearing Motion to strike all references to an affair appearing in the Transcript, Volume I, pages 196 and 197, should be denied as the Complainant opened the door to that issue.

15. That the Complaint has failed to establish that the Respondent discriminated against the Charging Party on the basis of her disability for purposes of Minn. Stat. sec. 363.03, subd. 1(1)(c)(1982).

Based on the foregoing Conclusions of Law and for the reasons set forth in the attached Memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED:

1. That the Respondent shall cease and desist from its discriminatory failure to take timely and appropriate action to correct the sexual harassment of the Charging Party.

2. That the Respondent pay the Charging Party \$16,269.75 as and for the

wages the Charging Party would have received had she not been separated from her employment in September, 1983.

3. That the Respondent reinstate the Charging Party, Mary Silvestri, to employment as an elementary school teacher at the salary she would otherwise have received had her employment not been interrupted, and with full time and service credits, for seniority and pension purposes; and that her reinstatement be accomplished before the commencement of the 1985-86 school year and be in a building not occupied by Richard Stocco.

4. That the Respondent pay to the Charging Party the sum of \$2,500 as and for punitive damages.

5. That the Respondent pay to the general fund of the State of Minnesota as a civil penalty the amount of \$2,500.

6. That the Charging Party not receive credit for the sick leave she used prior to October 1, 1983, but that she be credited with one-half of the sick leave she used after that date, with no adjustment for sick leave she would have earned had she been continuously employed.

7. That the Charging Party be reimbursed for the out-of-pocket insurance costs she incurred as a result of her separation from employment in the amount of \$1,874.95.

Dated this 28th day of February, 1985.

JON L. LUNDE
Administrative Law Judge

Reported: Transcript Prepared

MEMORANDUM

Facts.

In this case, it is necessary to determine what Stocco did to Silvestri, and what school officials knew about it. After a careful consideration of the evidence presented, and of the demeanor and credibility of the witnesses who testified, it is concluded that Silvestri's testimony regarding Stocco's actions was truthful, but that her testimony regarding conversations with school officials was not.

As to Stocco, the Complainant established by a preponderance of the credible evidence that Silvestri was repeatedly assaulted by him in a sexual manner, forced to perform oral sex, and verbally harassed by actions and statements of a sexual nature and statements regarding her disability. Silvestri's testimony about Stocco's actions was persuasive and believable. For example, her description of Stocco's first assault upon her (T, pp. 21 - 23) was compellingly vivid and credible. Moreover, her testimony was

corroborated by Dr. Bell and by Stocco's refusal to testify. Expert medical testimony can be used to corroborate a Charging Party's claims of sexual harassment. State v. Myers, 359 N.W.2d 604 (Minn. 1984). Silvestri's testimony was consistent with the medical history obtained by Dr. Bell, and with Dr. Bell's testimony and diagnosis. Dr. Bell testified that, in her opinion, Silvestri's allegations about Stocco were true, and based on the medical history she took, Dr. Bell concluded that Silvestri was suffering from a post-traumatic stress syndrome occurring as a result of a psychologically traumatic event that was outside the realm of normal human experience. That Silvestri was suffering from such a syndrome was evinced by the results of the Minnesota Multiphasic Personality Inventory Dr. Bell gave to Silvestri. It revealed a profile typical of a person who has been assaulted in the manner described by Silvestri.

Moreover, Stocco's refusal to testify at the hearing requires that an adverse inference be drawn against him. Brink's Inc. v. City of New York, 539 F.Supp. 1139, 1141 (D.N.Y. 1982); E.H. Boerth Co. v. Lad Properties, 82 F.R.D. 635, 645 (D. Minn. 1979); Grognet v. Fox Val. Trucking Service, 172 N.W.2d 812 (Wisc. 1969); Cf., Parker v. Hennepin City District Ct., 4th Jud. Dist., 285 N.W.2d 81 (Minn. 1979). His refusal to testify lends further support to Silvestri's testimony. Since Silvestri's testimony was believable, since it was supported by competent medical testimony, since the person accused of the acts refused to testify, and since Silvestri ultimately quit her job, even though she enjoyed her work, it is concluded that the Complainant has established that the sexual assaults occurred. There is simply no credible or persuasive evidence in the record to doubt Silvestri's testimony.

It is unlikely that any individual would fabricate serious allegations of criminal behavior, especially when revealing them is degrading and embarrassing. The Respondent hinted, however, that Silvestri's testimony was a complete fabrication dreamed up after the termination of an affair with Stocco or that it was consensual. The Respondent argues that the circumstances of the assaults are inherently unbelievable. It points to the fact that Silvestri failed to file any timely criminal charges, failed to promptly report the assaults that occurred to her husband or school officials, and failed to seek medical treatment for her arm. Moreover, it argues that her and her husband's actions were inconsistent with the seriousness of the acts alleged. These factors do not persuade the Administrative Law Judge that Silvestri was not sexually assaulted.

The record establishes that only one of every ten victims of a sexual assault files a report. No doubt, the common failure to report sexual assaults is due to their degrading and embarrassing nature and a reluctance to make them public. Silvestri's failure to promptly report Stocco's actions to

school administrators would not be unusual for that reason alone. However, equally compelling reasons for Silvestri's failure to report were present in this case. Not only was Silvestri concerned about her husband's health because he has an illness which is exacerbated by emotional stress, but Stocco had threatened Silvestri's disabled arm and her daughter. Given the reluctance of most individuals to report acts of sexual abuse, coupled with the threats and concerns involved in this case, it is concluded that Silvestri's failure to promptly notify her husband, school authorities or the

police does not suggest that no assaults occurred. It is understandable that any individual living in a small town would be hesitant to go public with the events that occurred, and Robert Silvestri's testimony regarding the stresses created by bringing criminal charges was believable and satisfactorily explained their failure to promptly bring criminal charges, and once having brought them, to withdraw them.

The circumstances and nature of Stocco's acts suggests that he does not like women and enjoyed the excitement of assaulting Silvestri when other individuals were, or might be, nearby. While his actions seem unusual, no evidence was offered to show that his behavior is uncharacteristic of sexual abusers or that such acts were of an unlikely nature.

Although it is hinted that there may have been an affair between Stocco and Silvestri, there is absolutely no probative evidence that was the case. In fact, the evidence suggests otherwise. If Silvestri was having an affair with Stocco prior to, or during, 1983, she would not have complained to Sellars about him in connection with their use of the storeroom and the sharing of films. Those complaints are totally inconsistent with a close, romantic involvement. Moreover, Dr. Bell persuasively testified that the termination of an affair would not cause the syndrome she diagnosed, as it is not the kind of psychologically traumatic event that is outside the realm of normal human experience.

Finally, the Respondent suggested that Silvestri's behavior, and that of her husband Robert, was inconsistent with a finding that the assaults occurred. The Respondent argued that if Silvestri was assaulted she would not have merely requested that Stocco be transferred, and that Robert would not have permitted his wife to return to work after February, 1983, having learned of the assaults. Robert Silvestri's failure to do more than he did to protect his wife is evidence that the assaults related by Silvestri did not occur, or that he was not aware of them. Nonetheless, the Administrative Law Judge is persuaded that if Robert knew about all of Stocco's acts, he felt that his warning to Stocco would be sufficient to preclude further assaults and that he could use his influence to get Stocco transferred without making any embarrassing disclosures. On the basis of this record, the Silvestris' failure to take more positive action does not persuade the Administrative Law Judge that Stocco's acts did not occur. The other evidence presented persuasively preponderates to the contrary.

However, the Administrative Law Judge is persuaded that Silvestri did not inform school officials of the full nature and extent of Stocco's actions, but limited her complaints to unspecified verbal harassment, a gesture with his

zipper, and a grabbing incident at her home, as Sellars testified. The entire

record persuades the Administrative Law Judge that Silvestri decided, either in consultation with her husband or on her own, that she did not want to make

Stocco's blatantly sexual assaults and other sexual acts a matter of public knowledge, but decided, instead, to attempt to obtain his transfer by disclosing as little of his actions as she thought would be necessary to obtain that transfer. There are several reasons for this conclusion.

First, in the abstract, it is believed that it is more likely that a victim would fail to disclose acts of sexual assault than that two responsible school principals would fail to do more than was done had they known about them. This follows from Dr. Bell's testimony that most sexual assaults go unreported, and is a reasonable inference because of the degrading, embarrassing and highly personal nature of the assaults and the effects disclosure would have in a small community like Chisholm.

In fact, the entire record shows that Silvestri's charges were always vague and non-specific and that no one, except for Robert, had any knowledge of the specific sexual assaults that occurred until after Silvestri's Human Rights charge was filed.

If Silvestri had decided to reveal the details of Stocco's actions in February, it is more likely that criminal charges would have been commenced at that time. Moreover, it is very unlikely that school officials informed of such acts would have sat idly by without taking some positive action. If Sellars and Antognozzi had been informed, they would have been concerned for the safety of students in Stocco's classes, and for Silvestri and other female teachers. If they did not believe Silvestri's story, they would naturally have serious concerns about her qualifications to continue teaching. However, they had no such concerns. Their lack of action and concern evinces a lack of knowledge.

If Silvestri had disclosed the full extent of Stocco's activities to Sellars and Antognozzi, it is incomprehensible that they would have advised her to keep a log. That they gave her that advice strongly suggests that her complaints were limited to vague incidents of verbal harassment and other less serious problems.

Moreover, if Silvestri had disclosed the details of these sexual assaults, it is unlikely that her brother, Terry Aronson, and her good friend, Judith Sellman, would have been totally ignorant of the details until after Silvestri's discrimination charge was filed. All Sellman knew prior to the time the discrimination charge was filed was that Stocco had placed Silvestri's hand on his penis during a film. She had also heard from Silvestri that Stocco's behavior was "more than verbal" and from reading her May 31 letter, knew there were allegations of 'verbal, sexual, and physical' harassment. However, she did not know any specifics and had no idea of their seriousness. As late as May 13, 1983, Silvestri's brother was totally ignorant of the specifics of Stocco's actions. He knew only that Silvestri was complaining about physical and sexual harassment. He remained ignorant of the specifics until Silvestri's charge was filed, and even then, he did not know about any other incidents until Silvestri testified to them at the hearing. Aronson's and Sellman's ignorance of the specifics of Silvestri's charges suggests that school administrators were ignorant about them as well.

Silvestri's reluctance to disclose the details of Stocco's actions is reflected in other ways. After the May 13, 1983 meeting, Aronson told her to put her complaints in writing and to be 'very specific'. However, after that advice was given to her, Silvestri's letter of May 31 contained no specific allegations but general allegations of "verbal, sexual, and physical"

harassment. Even when Silvestri's charge was finally filed with the Minnesota Department of Human Rights, it failed to mention the most serious acts Silvestri alleged at the hearing. It contained no allegation that Silvestri was involuntarily forced to engage in an act of oral sex or that Stocco had ejaculated on her and placed his hand in her vagina while she was restrained. Instead, it eluded to only one physical assault and only one instance of exposure. Later, when Silvestri was interviewed by Dr. Bell, Dr. Bell had some difficulty obtaining the specifics of Stocco's behavior from Silvestri, even though Bell is a professional and is experienced in eliciting that kind of information.

That Sellars and Antognozzi had no knowledge of the sexual assaults is also supported by their testimony and other evidence in the record. First, Silvestri's descriptions of her conversations with Sellars and Antognozzi were not persuasive. She testified that after explaining the sexual assaults to Sellars, Sellars told her that he would dismiss the guy and then "he just left the room." That is not persuasive. A school principal confronted with facts of violent sexual assaults against a teacher would not merely say I'll fire the guy and then simply leave the room. No normal conversation would be that inconclusive. one would normally expect the principal to obtain the details, schedule further meetings, consult with superiors, and take other positive action.

Moreover, the circumstances and timing of Silvestri's complaints to Sellars and her husband's complaints to Sellars do not logically fit together. If Silvestri informed her husband of the assaults that occurred, they must have discussed the manner in which they were going to deal with that problem. If they decided to disclose what actually happened, it is curious that they would not have done so in a more formal fashion by jointly meeting together with Sellars or Antognozzi or both of them at a prearranged meeting in their offices. However, they did not do that. Instead, Silvestri had an unscheduled discussion with Sellars in her room, even though she stated that she was nervous because Stocco might be near by. Later, Robert allegedly had his own, separate meeting with Sellars where he too had to inform Sellars that

she had been assaulted. Moreover, Silvestri testified that after her first conversation with Sellars she talked to him again and reiterated the sexual assaults that had occurred. These conversations are unnaturally uncoordinated and lack credibility. Likewise, Silvestri's testimony regarding her initial meeting with Antognozzi was not persuasive. Again it was an unscheduled conversation and her testimony about it lacked believability.

If Sellars and Antognozzi were aware of the serious sexual assaults Silvestri alleged they knew about, it is unlikely that those matters would not have been discussed at the May 13 meeting when Aronson, an attorney, was present to represent Silvestri. However, consistent with Sellars' and Antognozzi's testimony of their knowledge about the events that occurred, they only mentioned the storeroom and zipper incidents during that meeting. The fact that the 'storeroom incident' was mentioned is ambiguous because there were so many separate incidents in various storerooms. However, the Administrative Law Judge is persuaded that the "storeroom incident" referred to during that meeting was the verbal harassment and arguments that Stocco and

Silvestri had regarding the storeroom, and was not a reference to any sexual assault that occurred in a storeroom. Moreover, if Sellars and Antognozzi knew about the assault that occurred in the 'janitors closet' when Silvestri was forced to engage in oral sex, it is not likely that the janitors closet would be referred to as a storeroom.

Robert Silvestri testified that he informed Sellars and Antognozzi about sexual assaults in the school. His testimony in that respect is not persuasive. Silvestri is obviously interested in his wife's case here and his testimony must be evaluated accordingly. Evaluation of that testimony shows some inherent unreliability, such as his testimony that a sexual assault occurred in the 'lounge' and not in a janitors closet or in the storeroom. The most serious accusation made against Stocco is that he forced Silvestri to perform oral sex in the janitors closet. That incident would normally be the one incident, of all of them, that would have been the focus of the Silvestris' complaints. However, it was not.

For all these reasons, it is concluded that the testimony presented by Sellars and Antognozzi was more credible on the issue of what those individuals knew, and that their knowledge, prior to the time Silvestri's discrimination charge was filed, was limited to knowledge about an incident where Stocco had made a gesture with a zipper but had not exposed himself, had tried to grab or touch Silvestri at her home on one occasion and had verbally harassed her in an unspecified manner regarding their use of the storeroom separating their rooms, and that until the letter of May 31, 1983, they had heard no general allegation that she had been otherwise physically, sexually or verbally harassed or that she was in fear of her personal safety or concerned about her mental well-being.

Both Silvestri and her husband testified that they informed the superintendent of schools and two board members of sexual assaults which occurred in the school during the month of September 1983. That testimony was not persuasive. Valentini, who was a friend of the Silvestri family, and likely sympathetic to them, denied that he had any notice of sexual assaults. His testimony regarding the conversation with Silvestri was persuasive. That Silvestri complained about the attitude of teachers on the third floor, about the smoking incident, about Stocco's suggestion that she tear her blouse in Antognozzi's office and scream rape and her comments regarding Stocco's dislike of Valentini were credible. Even at the hearing Silvestri complained about her problems with other teachers on the third floor, the smoking incident, and Stocco's suggestion that she tear her blouse. Likewise, the testimony of Novak and Zahorski was persuasive in that the only information they obtained from Silvestri was that she being hassled or being verbally harassed in an unspecified manner and that Stocco had grabbed her arm. Her

and her husband's testimony that they were advised of sexual assaults was not sufficiently persuasive.

Substantive Legal Issue

The elements of a charge of sexual harassment are: that the Charging Party belongs to a protected group; that she was subjected to unwelcome sexual harassment; that the harassment, using a 'but for' test, was based on sex;

that the harassment affected a term, condition or privilege of her employment;
and that the employer knew or should have known of the existence of the harassment but failed to take timely and appropriate action to stop it. Continental Can Co. v. State, 297 N.W.2d 241 (Minn. 1980); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).

Most discrimination cases involve a three-step process of pleading and proof. First, the complainant must establish a prima facie case of discrimination. The respondent must then rebut the prima facie case by articulating some legitimate, non-discriminatory reason for the employment action in dispute, and then the complainant may show that the reasons offered by the respondent are a mere pretext for illegal discrimination. Hubbard v. United Press Intern, Inc., 330 N.W.2d 428, 441 n. 12 (Minn. 1983). The requirement to establish a prima facie showing of discrimination has been adopted as a surrogate for a showing of intent, because intent itself cannot generally be established with direct evidence. A prima facie case supplies the necessary inference of such an intent.

However, the elements of a prima facie case are not inflexible, and the three-part process of proof is sometimes inapplicable as a device for determining when the burden of production of evidence should shift from one party to another. It has been recognized that in actions based on sexual harassment, the three-part analysis mentioned above is not ordinarily applicable, because employers will not generally have a legitimate, non-discriminatory reason for harassment. See, Henson v. City of Dundee, supra at 905 n. 11. Therefore, in harassment cases, normal principles of pleading and proof allocations should apply. In this case, therefore, it is proper to place the burden on the Complainant to establish the necessary elements of a prima facie case by a preponderance of the evidence.

In this case the Complainant established, by a preponderance of the evidence, that the Charging Party, Mary Silvestri, is a member of a protected group, that she was subject to unwelcome sexual advances, assaults and demeaning sexual remarks, that the harassment was based on sex and that it was so substantial, outrageous and persistent, that it created a hostile, offensive and intimidating work environment. The only issue that remains to be decided, therefore, is whether District officials knew or should have known about the harassment that occurred and whether their actions were appropriate based on the knowledge they had.

In March, 1983, Silvestri told Sellars that Stocco had made a sexual gesture with his zipper, that he attempted to grab her and touch her in a sexual manner in her home, and that he was verbally harassing her over her use of the storeroom and her use of teaching supplies. Although Sellars had prior notice of problems between Silvestri and Stocco, he did not attempt to find out precisely what Stocco had done with his zipper or precisely what he had done to her at her home. The only question he asked her was whether Stocco

had exposed himself. He did not obtain any details about those two incidents or inquire whether any other incidents had occurred. Moreover, he never attempted to have Silvestri explain the nature or frequency of the verbal statements she complained about. Furthermore, although Sellars knew Silvestri

was distressed about Stocco at that time and suspected that Stocco may have been guilty of a crime because of his actions at her home, he offered Silvestri no formal assistance and did not even schedule a conference between Stocco and Silvestri to resolve their problems.

All Sellars did was to ask Stocco, the next day, if he had made a gesture with his zipper. When Stocco denied it, Sellars merely warned him that the verbal remarks were to cease and that he did not want any problems physically. He did not ask Stocco about the incident at Silvestri's home, even though Stocco's answers might have given him some insight into Stocco's veracity. After talking to Stocco, Sellars did not discuss Stocco's responses with Silvestri, he did not issue any formal written guidelines to employees, or make any official record of what happened. Sellars' actions were marginal, at best.

Subsequently, in May, Silvestri talked to Antognozzi. He also sensed that she was upset. However, he acted more responsibly. He advised Silvestri to keep a log of Stocco's comments and he promptly scheduled a meeting with Silvestri's brother for the next afternoon. Subsequently, he also made a limited inquiry of some of the teachers on third floor to find out if they had observed any incidents of verbal harassment.

After the meeting with Aronson, Sellars and Antognozzi both cooperated in an attempt to resolve Silvestri's problems. They listened to Aronson's suggestions and agreed to meet jointly with Silvestri and Stocco to resolve the problems those two were having. That meeting was held the same day. The meeting did not go too well, as Sellars admitted, and probably based, in part, upon that fact, Sellars and Antognozzi soon decided that they would reassign Silvestri and Stocco to different rooms commencing with the start of the next school year. They hoped to minimize their contacts and eliminate their joint use of the storeroom, which had been a source of many of their reported disagreements.

Although Sellars thought a room transfer would resolve the problem, he later received a letter from Silvestri reporting that she had continued to be verbally, physically, and sexually harassed by Stocco and that she wanted him transferred in the interests of her mental well-being and physical safety. At that point, Sellars and Antognozzi were on notice that something more serious

than mere verbal harassment was involved in Silvestri's complaints against Stocco. However, neither Sellars nor Antognozzi took any immediate steps to determine what specific physical, sexual and verbal harassment had occurred.

This was due, in part, to the fact that the school year was nearly completed or had been completed, and to Silvestri's request that she be notified of their decision on the transfer by the commencement of the next school year.

Before the next school year commenced, Sellars and Antognozzi confronted Stocco with Silvestri's letter of May 31. Again he denied the allegations she made. Based on his denial, the lack of any witnesses to any events, what Sellars perceived to be the best interests of students and teacher morale, he and Antognozzi decided that Stocco would not be transferred. He reached that decision and reported it to Silvestri before discussing the substance of her charges with her.

After Silvestri did return to school, she was absent seven days after the first day of class. Then, after teaching two days, she was absent permanently. By the end of September, 1983, Sellars, Antognozzi, and Zahorski were all aware that Silvestri was absent from school due to work-related conditions which rendered her unable to work. They knew, at that time, that she had alleged incidents of verbal harassment, that she had alleged that Stocco had made a sexual gesture with his zipper, that she had alleged that Stocco had attempted to grab her in a sexual manner at her home and that she had alleged other undefined incidents of physical, sexual and verbal harassment which made her fear for her personal safety and mental well-being. Moreover, they knew that Silvestri was alleging that Stocco had grabbed her disabled arm and tried to drag her into a storeroom.

The failure of District administrators to undertake a more careful investigation into the substance of Silvestri's complaints at that time was not reasonable. They had notice of specific incidents of inappropriate behavior and knowledge of general allegations of more serious behavior which they never attempted to investigate or identify. Although both Sellars and Antognozzi had requested that Silvestri keep a log of Stocco's actions, they never asked her to present that log to them. Their indifference to her situation at that point was not reasonable given the knowledge they had. Their failure to undertake a more thorough investigation of Silvestri's complaints renders them partially responsible for her continued absence from work after the end of September, 1983.

Therefore, it is concluded that Silvestri is entitled to some relief. However, because she did not specifically advise school officials of the sexual assaults that occurred on school premises, she is not entitled to all the relief that she has requested. For the reasons hereinafter set forth, it is concluded that the purposes and objectives of the Minnesota Human Rights Act will be best served if the District is ordered to reinstate Silvestri as a fourth grade teacher with full seniority credit for the period of her separation from employment; reinstate half the sick leave she used after October 1, 1983; and reimburse part of her lost wages and out-of-pocket costs. The school district is also be chargeable with punitive damages and a civil penalty, but not for pain and suffering.

District Administrators never seriously tried to identify or investigate Silvestri's charges of verbal, physical and sexual harassment. They did not attempt to discuss those charges with Silvestri, even though they were surprised by the allegations she made in her May 31 letter. When they learned that she was alleging verbal, physical and sexual harassment which caused her to be concerned for her physical safety and mental well-being, they had an obligation to discuss her allegations with her and to identify specifically the incidents of harassment that she was alleging. That was never done. Although they asked Stocco about her charges, their discussions with him were

certainly inadequate because they could not discuss any specific incidents but only general allegations. They had no way of evaluating the credibility of Stocco's denials when they could not discuss specific incidents with him, and they had no way of determining the nature and extent of the investigation they should undertake or the remedial steps that would be appropriate when they did know the kinds of

behavior or the specific incidents they should have been looking into or trying to prevent. Antognozzi testified that he did, on one or two occasions, talk to some of the teachers on the fourth floor about incidents of harassment. However, he did not talk to all of them, no students or janitors were questioned and no steps were undertaken to monitor Stocco's behavior. Since the Respondent did not attempt to find out what incidents of harassment had actually occurred, it had no way to determine whether or not its response was adequate or reasonable. In fact, the failure of District administrators to identify Silvestri's specific complaints to determine the nature of the investigation that should be undertaken and the steps that should be followed to prevent further harassment shows a complete indifference to the sexual harassment she alleged and renders them liable for her continuing absence from work after October 1, 1983.

Sellars made the decision not to transfer Stocco before identifying Silvestri's specific allegations. That might have been a reasonable approach had the meeting he suggested in his letter to Silvestri been held. However, before the meeting was held, Silvestri left her job. After that, District administrators learned that she was unable to work due to conditions there and that she had actually been physically grabbed by Stocco, on at least one occasion, when he tried to drag her into a storeroom. However, after obtaining that information late in September, they made no effort to communicate with Silvestri to discuss the reasons for her inability to work, the nature of the acts she mentioned in her May 31 letter, or the circumstances surrounding the incident when Stocco had grabbed her arm and tried to drag her into a storeroom. Their failure to take any action at that point, knowing what they did about the zipper incident and Stocco's attempt to grab or touch Silvestri in a sexual manner the prior winter, was not a reasonable one. They had an obligation at that point to identify Silvestri's specific allegations and to investigate them. They chose not to do so. That choice was not acceptable for purposes of the Minnesota Human Rights Act. Under the Act, an employer has an obligation to provide a workplace free of sexual harassment. When an employer knows or should know that incidents of sexual harassment are occurring it has an obligation to take prompt and appropriate action. Under the circumstances it is concluded that they discriminated against Silvestri, but that their liability must be limited as a

result of the Charging Party's failure to make full disclosure of Stocco's actions, as that failure contributed to the damages she suffered.

Under Minn. Stat. sec. 363.071, subd. 2(a), an employee who has been constructively discharged from employment as a result of sexual harassment may be reinstated with back pay. Normally back pay should be authorized in an amount which will make the Charging Party whole so that the Charging Party is placed in the same position she have been in had no discrimination occurred. Brotherhood of Railway and Steamship Clerks v. Balfour, 229 N.W.2d 3, 13 (Minn. 1975). In this case, it is concluded that the Charging Party should receive 75% of the salary she lost when her sick leave ran out on January 24, 1984, through the date of this Order. However, no front pay should be awarded until her reinstatement, and no interest should be added to the back pay awarded. The courts have permitted reductions to back pay damages when a charging party's actions have contributed to them. Continental Can Co. Inc. v. State, supra, at 251. The same rationale is applicable here.

In addition, one-half of the 74 days of sick leave the Charging Party used on and after October 1, 1983 should be restored to her. By that date the employer should have done more to identify, investigate and act on her charges of sexual harassment, and having failed to do so, it is partially liable for her inability to return to work after that time. However, the sick leave used prior to the pivotal date of October 1, 1983, should not be restored, as the Respondent had no notice that Stocco may have grabbed Silvestri's arm and attempted to drag her into a storeroom prior to that time, and had not received the first report from Silvestri's doctor. Moreover, the Respondent shall pay to the Charging Party the sum of \$1,874.95 which the Respondent incurred to maintain the insurance coverage she would have had through the end of February 1985 but for the Respondent's failure to promptly identify, investigate and deal with the sexual harassment she alleged.

The Respondent is not required to immediately reinstate Silvestri because her separation from employment was due, in part, to her failure to make full disclosure. Moreover, her immediate reinstatement and the resulting reshuffling of teachers late in the school year could have an adverse effect upon pupils. Therefore, it is concluded that the Respondent should have until the commencement of the next school year to implement reinstatement.

The Administrative Law Judge is reluctant to order that Stocco be transferred because the Respondent knows better whether Stocco, if he is retained, or Silvestri, should be reassigned to a different class. It should, therefore, make that decision consistent with the best interests of its students. However, the Respondent should be required to offer Silvestri employment at a building other than one where Stocco teaches. The Respondent has not argued or shown that such a requirement is unauthorized, that it would adversely affect its students, or that any reasonable alternatives are available.

In addition, it is concluded that the Respondent should pay \$2,500 as a civil penalty to the general fund to the State of Minnesota under Minn. Stat. sec. 363.071, subd. 2. In determining the amount of the civil penalty to be paid, the Administrative Law Judge must consider the seriousness and effect of the violation, the public harm occasioned by it, whether the violation was intentional and the financial resources of the Respondent. In this case, a civil penalty is appropriate because of the Respondent's indifference to the Charging Party's working conditions and the public harm occasioned by such behavior on the part of employers. The Administrative Law Judge is not persuaded that the Respondent's administrators intentionally discriminated against the Charging Party on the basis of her sex, and has no doubt that the financial resources of the Respondent are limited due to economic conditions in that part of the state. Therefore, \$2,500 is appropriate.

In addition, the Administrative Law Judge is persuaded that the Charging Party should be awarded \$2,500 as and for punitive damages pursuant to Minn. Stat. SS 549.20 and 363.071, subd. 2. Punitive damages must be measured by the certain statutory factors including the seriousness of hazards to the public arising from a respondent's misconduct, the profitability of the misconduct, its duration, its concealment, the degree of the respondent's

awareness of the hazard, the attitude and conduct of the respondent upon its discovery, the respondent's financial condition, and the total effect of other

punishment likely to be imposed upon the respondent as a result of its misconduct. In this case, it is concluded that \$2,500 is a reasonable penalty. The Administrative Law Judge is persuaded that the failure of Zahorski, Sellars and Antognozzi to identify and investigate Silvestri's charges of verbal, physical and sexual harassment, knowing that they rendered

her unable to work, and knowing that Stocco may have attempted to drag her into a closet or worse, clearly and convincingly shows an indifference to her

rights as a woman employee and her physical safety and mental well-being which

justifies the award of punitive damages. The school officials indifference to

her situation, her inability to work, and her allegations, while not profitable to the District, require an award of punitive damages.

The Administrative Law Judge is not persuaded, however, that the Charging

Party should be compensated for her mental anguish and suffering. Clearly she

did suffer as a result of Stocco's behavior. However, it is not appropriate in this case to make the Respondent liable for that suffering. The sexual assaults which triggered it were not known to them and could not have been prevented by them. Absent full disclosure of the nature and severity of the harassment she suffered it should not be chargeable with pain and suffering here.

Although the Respondent was charged with disability discrimination, the Administrative Law Judge is persuaded that the discrimination that occurred was based on the Charging Party's sex, and not on her disability, and that no disability discrimination was established.

J.L.L.

